No. 21832

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

KENYON FARMS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLANT

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I N D E X

CITATIONS

Cases:

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JURISDICTIONAL STATEMENT

The appellant United States brought this action in the United States District Court for the District of Idaho, seeking to recover damages for conversion by the appellee of potatoes and other crops on which appellant held a crop and chattel mortgage. Jurisdiction of the district court was founded on 28 U.S.C. 1345, and was not contested. On January 5, 1966, after trial, the district court entered judgment for the appellee dismissing the complaint (R. 32). Upon motion of the appellant, the district court reopened the case for the taking of further evidence (R. 36). On

December 20, 1966, after the taking of further testimony, the district court entered an amended judgment, again dismissing the complaint (R. 52). The United States has taken this appeal from that judgment in favor of the appellee. The jurisdiction of this court is based upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This action was brought by the United States against the appellee, Kenyon Farms, a corporate farm in Idaho, for conversion of potatoes and other crops on which the Farmers Home Administration held a crop and chattel mortgage. The crop and chattel mortgage was obtained as security for loans made by the Farmers Home Administration in 1957, 1959 and 1960 to Mr. and Mrs. Blaine P. Martindale (R. 10). Prior to 1960, Martindale was a tenant on a farm owned by Mr. W. B. Whiteley, located in Cassia County, Idaho. Beginning in 1960, Martindale also was a tenant on a farm owned by Kenyon Farms, Inc. (of which Whiteley was President and in which he held a large interest, (R. 50), located about 12 miles from the Whiteley farm, but also in Cassia County. The district court found after the second trial session, that Martindale had a one-half interest in the crops grown on the part of Kenyon farms which he was leasing (R. 48).[1/]

1/ The district court after the first trial had found that Martindale had no interest in the crops grown on Kenyon Farms in the crop years 1961 and 1962 (R. 30). The court, however, granted the motion to re-open the case on the ground of surprise, noting that the appellee's answer (R. 21) had admitted that Martindale was its tenant under a lease arrangement (R. 36). As noted, after hearing further testimony on the nature of the arrangement between Kenyon Farms and Martindale, the district court found that Martindale had a one-half interest in the crops (R. 48).

In March 1960, and March 1962, the Farmers Home Administration properly recorded its Crop and Chattel Mortgages in the Cassia County Recorder's Office (Tr. 34). The mortgages covered the Borrower's (Martindale's) interest in "all crops now standing, planted, sown, growing, or grown and all crops that may be standing, planted, sown, growing or grown within two (2) years after the date hereof, on the land described hereinafter, and on any other lands owned, leased, or controlled by the Borrower in the county(ies) identified hereinafter or in an other county(ies) in the State of Idaho . . ." (R. 10, emphasis added).

In the crop years of 1960 and 1961, Martindale's half interest in the potatoes and other crops grown on the Kenyon Farms trac was sold by Kenyon Farms to Idaho Potato Processers, Inc., of whic Whitely was an officer (Tr. 50). The proceeds, however, were not paid to Martindale (Tr. 12-13, 16-18), but instead were credited to a pre-existing indebtedness of Martindale to Whiteley (R. 28). In short, Kenyon Farms used the crops covered by Farmers Home Administration mortgages, in order to pay unsecured debts of Martindale.

The district court, however, refused to hold Kenyon Farms liable as a converter of the crops. It held that Kenyon Farms did not have constructive notice that the crops grown on its land were covered by the Farmers Home Administration crop mortgages, because (a) the Kenyon Farms tract was not specifically described in the mortgage, and (b) the clause in the mortgage (R. 10)

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covering crops "on all other lands leased in the county" was in "very small print" (R. 49). The court thought that the mortgage would mislead "even a careful examiner," because the description of the Whiteley property was in prominent type (viz., it was typed onto the form), but the clause covering any other lands was in fine print. The court stated that "the form of the mortgage is a trap, and . . . a reasonable person, using due diligence, would very likely, on an examination of an examination of the instrument, fail to perceive that other property was intended to be covered by the mortgage" (R. 49). It does not appear, however, that Kenyon Farms made such an examination, diligent or otherwise.

SPECIFICATION OF ERRORS

1. The district court erred in concluding that the chattel and crop mortgages in question did not give the appellee constructive notice of the appellant's lien on Martindale's interest in the crops grown on the land owned by the appellee.

2. The district court erred in concluding that the appellee had not converted any property on which the appellant had a lien of which appellee had legally binding notice.

3. The district court erred in dismissing the complaint, rather than entering judgment in favor of the appellant.

SUMMARY OF ARGUMENT

The properly recorded mortgage in question constituted constructive notice to Kenyon Farms of the Government's lien on Martindale's interest in the crops grown on Kenyon Farms' lands. The district court's holding that the clause of the mortgage

covering crops grown on lands not specifically described, was not constructive notice to Kenyon Farms because it was in "fine print," is untenable. A reasonably diligent corporate farm about to sell thousands of dollars worth of its tenant's crops must be expected to take the trouble not just to go to the county recorder's office--as the law clearly requires--but to read a few sentences on the first page of a crop mortgage, even if they are in small print. No diligent person who actually went to the county recorder's office would have failed to read the clause in question, covering crops grown on all lands in the county, including those not specifically described. The clause is written in plain, understandable English, and the print is easily readable. The form of the mortgage is not a "trap"; the significance of the material typed onto the form--which the district court apparently thought was the only material which a reasonable person would read--is not apparent until one reads the smaller type in which all of the mortgage is printed.

ARGUMENT

THE CLAUSE IN THE GOVERNMENT'S PROPERLY RECORDED CROP MORTGAGES COVERING CROPS GROWN BY MARTINDALE ON ALL LANDS LEASED IN CASSIA COUNTY, IDAHO, CONSTITUTED CONSTRUCTIVE NOTICE TO KENYON FARMS OF THE GOVERNMENT'S LIEN ON CROPS GROWN BY MARTINDALE ON ITS LANDS IN CASSIA COUNTY. A REASONABLY DILIGENT PERSON WOULD HAVE READ AND UNDERSTOOD THE CLAUSE, THOUGH IT WAS IN SMALL PRINT.

The district court absolved the appellee, Kenyon Farms, of conversion of crops covered by the Government's Crop and Chattel Mortgages on the sole ground that the clause in the mortgages

(R. 10) covering "all crops...grown...on any other lands...leased ...by the Borrower in the county" did not constitute notice to Kenyon Farms because it was in "small print." There is not, and could not be, any suggestion that the clause is invalid, or that its meaning is difficult to understand. See, e.g., Livestock Credit Corp. v. Corbett, 53 Idaho 190, 22 P. 2d 874 (1933). Moreover, if Kenyon Farms did have constructive notice of the clause, it is beyond question that its sale of Martindale's interest in the potatoes and other crops constituted a conversion. E.g., United States v. Matthews, 244 F. 2d 626 (C.A. 9); United States v. White, 143 F. Supp. 754 (D. Idaho).

The sole question, then, is whether a reasonably diligent person would have taken notice of the clause.[2/] The district court committed clear error in ruling that the clause did not constitute notice to a reasonably diligent person. The law requires a reasonably diligent person to take the trouble to go to the county recorder's office and search the records for chattel mortgages, at pain of being held liable for conversion. Surely, anyone who actually did go to the county recorder's office and conduct the required search, would have been completely lacking

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2/ Cf. Williston on Contracts (3d ed. 1957) §90C: "In the cases where the courts have qualified the principle that acceptance of the document implies acceptance of its terms, the test frequently applied is whether a reasonably careful person would have seen the clause or could have been expected to see it."

in diligence if he did not, once he found the Farmers Home Administration mortgage, take the few additional seconds necessary to read approximately three sentences on the first page of the mortgage (R. 10).

Under the district court's ruling, it appears that someone who went to the Cassia County recorder's office and found the mortgages in question would not have to read any of the operative terms, all of which are in the same size print.[3/] Yet it is hornbook law that all purchasers are on constructive notice of all terms of a properly recorded mortgage or deed. E.g., Ochoa v. Hernandez, 230 U.S. 139, 164; Northwestern Bank v. Freeman, 171 U.S. 620, 629 ("A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed"). The essence of a recording system is that subsequent purchasers are bound to read the terms of deeds or mortgages they find; and they must go to the appropriate recorder's office for that very purpose. We have found not a single case which suggests that such purchasers may be relieved of that obligation when they find a mortgage in small, though perfectly readable type, much less one that holds that failure to read only three sentences on the front page of the mortgage may be excused for that reason.

3/ The decision below, might well render unenforceable as against purchasers from mortgagors of the Farmers Home Administration every substantive term of every single FHA crop and chattel mortgage in Idaho.

The district court thought that Kenyon Farms was not on notice of the clause covering crops grown on its lands by Martindale, because the form of the mortgage was a "trap" which would mislead it not to read the clause. The only reason assigned for that conclusion is that the specific description of Whiteley's property is in larger print than the clause which covers all other lands in the county; i.e., it is typed onto the form. We submit that that consideration would not have led even a lax person to miss the clause in question, much less a businessman meeting the high standard of attentiveness to the terms of recorded mortgages heretofore always required. As already noted, all the substantive terms of the mortgage are in the same size print, and surely no one finding a crop mortgage on Martindale's crops would think he could ignore all its terms. A prospective buyer with minimal curiosity would read the crucial clause "II. THE BORROWER does hereby mortgage the Government, his interest in..." The significance of the specific description of the "W.B. Whiteley Lease" is not apparent until the clause which the court below held was not notice is read. Thus, one seeing the specific description would be led to read the clause immediately preceding it, not "trapped" into not reading the clause.

The factors which occasionally have led the courts to hold clauses in various documents--though never in recorded mortgages--not binding because in fine print, are notably absent here. The clause covering crops grown by the borrower on all lands in the

county, as well as on the specifically described property, is not a "trick" provision, which a purchaser would not expect to find in a crop mortgage. On the contrary, such provisions have been used in Idaho for more than 30 years, with the express approval of the Supreme Court of that State. Livestock Credit Corp. v. Corbett, 53 Idaho 190, 22 P. 2d 874 (1933). A reasonably diligent corporate farm about to purchase or sell thousands of dollars of its tenant's crops, should be looking for that very clause. In the present case Kenyon Farms could have found it in seconds.[4/] It seems significant that even the sharecropper, Mr. Martindale, was able to discern that "the mortage seemed to cover anything that I would operate" (Tr. 11).

The clause is easily readable. It is not buried in a mass of small print in an obscure place in the document, but is on the first page, in a short, readable sentence. The type is leaded, not run together.[5/] Moreover the clause is in plain English, not

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4/ At trial, Kenyon Farms pointed to the fact that prior to 1960, the FHA did not use the clause in the form appearing in the 1960 and 1962 mortgages in question (Tr. 36-38). However, there is no evidence that officers of Kenyon Farms knew what forms FHA used either before or after 1960, and hence no evidence that Kenyon Farms (or anyone else) was misled by the change in form.

5/ Contrast Insurance Co. v. Slaughter, 12 Wall. (79 U.S.) 404, where the Court commented unfavorably on the inclusion of an unusual clause which an insured would not expect to find, and which was alledged by the insurance company to modify language in larger print, which was followed by, "in a smaller type, not leaded, eight paragraphs, covering the rest of the sheet, and making a solid body of finely printed matter..."

in confusing legalisms which a layman might find difficult to understand, or might be discouraged from reading. And, of course, as already stressed, a recorded mortgage is not the kind of document, which, like a "contract of adhesion," comes before the reader in circumstances in which experience teaches he is likely to pay attention only to terms in prominent type (e.g., when accepting a ticket at a parking lot or boarding a plane).[6/] While it is a salutary rule that a term in a document which one cannot fairly be expected to notice does not bind him, that rule does not excuse lack of ordinary care in reading legal documents. Nor is it the law that a businessman may routinely be absolved of the consequences of his failure to read a legal document, on the ground that the document, though readable, was in small print. Compare Westinghouse Elec. Co. v. Murphy, Inc., 425 Pa. 166, 228 A. 2d 656 (1967), with Cutler Corp. v. Latshaw, 374 Pa. 1, 97 A. 2d 234 (1953).[7/]

6/ Compare Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237, 241 (S.D. N.Y.), affirmed, 370 F. 2d 508 (C.A. 2), petition for certiorari pending, 35 L.W. 3356, where "conditions" in a mass of fine print about 1/2 the size of the crop mortgage print involved here, on the fourth page of an airline ticket, were held not to bind the passenger to the limitations on liability of the Warsaw Convention.

7/ See also Yerxa, Andrews & Thurston, Inc. v. Randazzo Macaroni Mfg. Co., 315 Mo. 927, 288 S.W. 20, 33 (1926).

Kenyon Farms, if reasonably diligent, would have noticed the clause covering Martindale's interest in crops grown on its lands. Therefore, it is liable for conversion. 8/

CONCLUSION

The judgment of the district court should be reversed, with instructions to enter judgment for the United States.

Respectfully submitted,

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Acting Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

Walter H. Fleischer

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Department of Justice,
Washington, D.C. 20530.

AUGUST 1967

8/ In its answer (R. 21-22), Kenyon Farms raised several defenses to this action, other than its "fine print" objection. None are sound, and none were accepted by the court below. Kenyon Farms' main contention appears to be that it made advances to Martindale to assist him in growing crops on its lands, whereas the FHA did not, and that it therefore should be able to set off those loans, or that the Government somehow is "estopped" from holding appellee liable for conversion because of such loans to Martindale. However, a voluntary, unsecured advance by a landlord to his tenant gives him no rights against one who holds a lien on the tenant's crops. Goss v. Iverson, 72 Idaho 240, 238 P. 2d 1151 (1951). Nor is there any record evidence of inequitable conduct giving rise to an "estoppel". Moreover, the Government may not, in any event, be "estopped" by the conduct of its agents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380.

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Walter H. Fleischer

WALTER H. FLEISCHER

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

WALTER H. FLEISCHER, being duly sworn, says:

That on August 22, 1967, he caused three copies of the foregoing brief for appellant to be served upon appellee by placing them in the United States Mail, air mail, postage prepaid, in an envelope addressed to counsel as follows:

Herman Bedke, Esquire
Burley, Idaho 83318

Walter H. Fleischer
WALTER H. FLEISCHER
Attorney,
Department of Justice,
Counsel for appellant.

Subscribed and Sworn to before me this 22nd day of August, 1967.

[Seal]

Angeline Johnson
NOTARY PUBLIC

My Commission expires April 14, 1972.

A P P E N D I X

Form FHA 30.16
(Rev. 12-4-58)

4 Position Folder—Position 1

Case No. 12-16-2607

"Exhibit C"

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION

CROP AND CHATTEL MORTGAGE

(Idaho)

I. THIS MORTGAGE made this 16th day of March, 19 60, by Burns P. Martindale and Rachel O. Martindale, of Oakley, Idaho (Post-office address), County of Cassia

State of Idaho, Mortgagor (hereinafter called the "Borrower"), is given to the United States of America acting through the Farmers Home Admini United States Department of Agriculture, and its duly authorized representatives, Mortgagee (hereinafter called the "Government"), in consider and to secure the payment of:

(1) The sum of Thirteen Thousand Eighty-seven and 65/100- - - - dollars ($ 13,087.65), [the u unpaid principal remaining upon loan(s) made to or assumed by the Borrower] which debt(s) is (are) evidenced by (a) promissory note (s) or assumptio nent(s) given by the Borrower now held by the Government, as payee, in addition to interest on such note(s) or assumption agreement(s) as therein and also secured hereby, said note(s) or assumption agreement(s) being described as follows:

Principal Amount	Date	Last Installment Due
5930.00	November 20 57	February 15
6750.00	February 26 59	December 15
1500.00	January 11 60	February 15
	19	
	19	
	19	

nd any first and successive extensions or renewals, in whole or in part, of any or all of such promissory note(s), or of any other obligations secured ncluding interest thereon.

II. THE BORROWER does hereby mortgage to the Government, his interest in (a) all crops now standing, planted, sown, growing, or grown and hat may be standing, planted, sown, growing, or grown within two (2) years after the date hereof, on the land described hereinafter, and on any oth wned, leased or controlled by the Borrower in the county(ies) identified hereinafter or in any other county(ies) in the State of IDAHO; and (b) the f ntitels, all of which are located or to be located on the premises known as the W. B. Whiteley farm or ranch, located and pproximately 1 1/2 miles in a North erly direction from the town or city of Oakley, in the C Cassia and State of IDAHO, said premises consisting of a certain parcel or parcels of land, situate, lying, and e county(ies) of Cassia, and State of IDAHO, and more specifically described as follows:

W. B. Whiteley Lease: Northeast Quarter of the Southeast Quarter of Section Sixte Township Thirteen South, Range Twenty-two East, Boise Meridian. Also commen at the Southeast corner of the Northwest Quarter of Section Twenty-eight, Township Thirteen South, Range Twenty-two East, Boise Meridian running thenc West 80 rods, thence East 20 rods, thence South 64 rods to the place of beginning. Also the Northwest Quarter of the Southwest Quarter of Section Twenty-eight, Section Thirteen South, Range Twenty-two East, Boise Meridian;

NE¼SE¼ of Section Sixteen, Township 13 South, Range 22 East, Boise Meridian. Also SE corner of NW¼ of Section 28, Township 13 South, Range 22 East, Boise Meridian. Also NE¼SW¼ of Section 16, Township 13 South of Range 22 East, Boise Meridian.